IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

BALFOUR, GUTHRIE & CO., LTD., and
COMMONWEALTH AFRICAN, LTD.,
Petitioners,

against

Steamship "ZAREMBO," her engines, etc., AMERICAN-WEST AFRICAN LINE, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is officially reported in 44 F. Supp. at page 915. It is also reported in 1942 American Maritime Cases at page 544. The District Court's findings of fact and conclusions of law are printed at pages 1286 to 1297, and its opinion at pages 1272 to 1284 of the Record. The District Court decree appears at pages 1298 and 1299 of the Record.

The opinion of the Circuit Court of Appeals is officially reported in 136 F. (2d) at page 320. It is also reported in 1943 A. M. C. at page 954 and appears at pages 1342 to 1347 of the Record.

Jurisdiction

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution.

Facts

The facts are stated in the petition and will not be repeated here.

Specifications of Error

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that shipowners may discharge the statutory duty of due diligence under the Carriage of Goods by Sea Act by employing reputable surveyors;

(2) In holding that the statutory requirement of due diligence is satisfied by an examination which does not disclose such major unseaworthiness as the wasting away of the outside shell plating of a vessel over a period of years to a point where the plates are reduced to less than a third of their original thickness and less than half of the thickness commonly regarded as a safe minimum.

POINT I

The standard of diligence imposed by this Act is at least as high as the standard by which diligence was measured under the Harter Act; and the shipowner cannot, under either Act, relieve himself of his duty by delegating it to a third party.

The pertinent provisions of both Acts are set forth in Appendix A and B hereof. Section 4, subdivision 1, of the Carriage of Goods by Sea Act (46 U. S. Code, Sec. 1304, sub. 1; Appendix A at p. 24) exempts the carrier from liability for loss "resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier

to make the ship seaworthy." The analogous provision in the Harter Act is contained in Section 3 (46 U. S. Code, Sec. 192; Appendix B at p. 25), which exonerates the shipowner from liability for loss "resulting from faults or errors in navigation or management of" the vessel, provided that the shipowner has exercised "due diligence to make the said vessel in all respects seaworthy." It is to be noted that Section 2 of the Harter Act (46 U. S. Code, Sec. 191; Appendix B at p. 25) merely makes unlawful and invalid any bill of lading agreement lessening, weakening or avoiding the obligation of the shipowner under the general maritime law "to exercise due diligence * * * to make said vessel seaworthy." The Carriage of Goods by Sea Act, however, goes farther and in Section 3, subdivision 1 (46 U. S. Code, Sec. 1303, sub. 1; Appendix A at p. 23), provides that "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to (a) make the ship seaworthy; * * *." In view of the affirmative imposition of a statutory duty to exercise due diligence, it seems clear that the nature and extent of that duty should be measured by the judicial interpretation previously given to the phrase "due diligence" as used in the Harter Act. As Judge TUTTLE pointed out in *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.*, 32 F. Supp. 520, at pages 531-2, "* * * the 1936 Act has not reduced the standards by which the seaworthiness of a vessel is to be tested, nor the requirements that constitute the exercise of due diligence." See also cases cited at page 10, *supra*.

In *International Navigation Co.* v. *Farr & Bailey*, 181 U. S. 218, 225, 226, this Court held that the duty of due diligence under the Harter Act cannot be delegated.

In *Wilsons & Clyde Coal Co.* v. *English*, 1938 A. C. 57, Lord WRIGHT, in the course of his concurring opinion in the House of Lords, stated at page 80:

> "If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence or to take reasonable care to

> provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert; the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

That the duty of due diligence cannot be delegated under the Harter Act has been settled law since this Court decided the case of *International Navigation Co.* v. *Farr & Bailey*: see the decisions of the Circuit Court of Appeal for the Fourth Circuit in *The Maria*, 91 F. (2d) 819, 824; *The Pinellas*, 45 F. (2d) 174, 177; *Nord Deutscher Lloyd* v. *Insurance Company of North America*, 110 Fed. 420, 427. See also the decisions of the Circuit Court of Appeals for the Fifth Circuit in *The Framlington Court*, 69 F. (2d) 300, 307, and *The Leerdam*, 17 F. (2d) 586, 587. In the latter case the court summed up the rule as follows:

> "Due diligence to make a vessel seaworthy must in fact have been exercised. It is not sufficient for a shipowner to show that he had employed competent men to do the work, but he is held responsible for the failure of the men he employs" (p. 587 of 17 F. (2d)).

The Ninth Circuit, particularly, has accepted without question the doctrine of *International Navigation Co.* v. *Farr & Bailey*. See *The Feltre*, 30 F. (2d) 62, at page 64 (C. C. A. 9), and *Bethlehem Shipbuilding Corp.* v. *Gutradt Co.*, 10 F. (2d) 769 (C. C. A. 9). The latter case is particularly interesting. There cargo shipped by the Gutradt Company was damaged by seawater which entered the hold through a defective clapper valve. The Pacific Mail Company had employed the Bethlehem Shipbuilding Corporation to overhaul and repair all clapper valves on the ship's sides and the vessel had been redelivered to the carrier only a few days before the cargo was loaded. In affirming the District Court decree (1925 A. M. C. 1818), which held the

shipowner primarily liable, the Circuit Court of Appeals said at page 771:

> "It is clear to us that, when the ship was redelivered to the Pacific Mail Company, the shipbuilding corporation had broken its contract by failing to repair the clapper valves in No. 2 hold, and a mere statement of the fact that the defective clapper valve let the water in compels the view that the ship was unseaworthy. It therefore devolved upon the steamship company to show that due diligence was exercised to make the ship seaworthy under the pertinent provisions of the bill of lading.
>
> As between the Pacific Mail Company and the Gutradt Company, the duty of making the ship seaworthy was a nondelegable one; hence the steamship company could not successfully defend on the ground that it had made a contract with the shipbuilding corporation to repair and overhaul the clapper valves unless it could also show that the shipbuilding corporation had performed its contract."

POINT II

Any inspections or tests which do not disclose such flagrant and dangerous unseaworthiness as threatened the lives and property of the passengers and crew as well as the cargo of the "Zarembo" do not satisfy the statutory duty of due diligence to furnish a seaworthy ship.

The foregoing proposition would appear to be self-evident: "due" means "appropriate," and due diligence means that degree of care appropriate to the degree of danger to be anticipated from a breach of the particular seaworthiness to which the diligence is directed. See *The R. P. Fitzgerald*, 212 Fed. 678, at page 684 (C. C. A. 6th); Judge Hough's observations in *The Julia Luckenbach*, 235 Fed. 388, at page 390; and the other cases cited at pages 19-21, *infra*. For example, the danger to be anticipated from

a loose rivet in a tank top is simply the leakage of a small amount of oil or water which may damage some of the cargo, but would be quite unlikely to threaten the safety of the ship. Obviously, therefore, the degree of diligence appropriate to locating such a loose rivet would be utterly inadequate in the case of the outside shell plating of a 20-year-old vessel which has worn thin to the point where it has lost three-fourths of the thickness which the naval architects and builders considered proper for the protection of the vessel.

Respondent is challenged to cite a single case in which a shipowner has been exculpated by reason of mere visual examinations from liability for damage due to the wasting away of a vessel's outside plating. In fact, even in case of leaky rivets and piping the shipowner has generally been held to a standard of diligence requiring something more than a mere visual examination.

The very fact that this condition of surface corrosion which (in the opinion not only of petitioners' experts but also of three surveyors, called by respondent) had existed for years, was not found by the inspections in New York in November, 1939, is the best possible proof that those inspections were inadequate and insufficient. In *The Georg Dumois,* 88 Fed. 537, the court said at pages 541-2:

> "it seems evident that such an accident, for which no immediate cause can be given, indicates that the means of inspection employed in New York were imperfect, and that the inspection itself was negligent and insufficient."

In that case leakage from corroded staybolts was discovered about a week after the boiler had been repaired and "a most thorough and sufficient inspection indicated no leakage."

In *The Julia Luckenbach,* 235 Fed. 388, the Circuit Court of Appeals approved the opinion of Judge HOUGH in the District Court, in which he had stated (p. 389 of 235 Fed.):

> "The immediate cause of flooding the hold and of the consequent destruction of sugar was the sudden breaking of the impaired plate. Such impairment of plate had evidently existed long before the beginning of the voyage, * * *. (p. 390) Due diligence must always be proportioned to the amount of danger reasonably anticipated, so it is evident that owners of this ship were bound to exercise special care to guard against the special danger that has produced this great loss."

In *Brazil Oiticica, Ltd.* v. *S. S. Bill*, 47 F. Supp. 969 (D. C. Md.), the Court held that corrosion on the inside of a steel bilge pipe was not a latent defect within the Carriage of Goods by Sea Act, stating at page 978:

> "More importantly the contention is untenable because the defect in the bilge pipe was not a true latent defect. The defect in the bilge pipe was not due to any flaw in the metal, but to the corrosive effect of foreign substances resulting from the use of the ship. A latent defect is one that could not be discovered by any known and customary test. *The Carib Prince*, 170 U. S. 655, 658, 663; *The Citta di Palermo* (D. C.), 226 Fed. 522, 526. Such cases as the *Quarrington Court* (2d Cir.), 122 F. (2d) 266, and *The Indrani*, 177 Fed. 914 (2d Cir.) cited by counsel for the shipowner are really not in point here because the damages there resulted from a sudden and fresh breaking of pipes caused by a flaw or defect in the metal, and were not the result of gradual deterioration as happened in the instant case."

In *The Millie R. Bohannon*, 64 Fed. 883 (S. D. N. Y.), Judge Brown said (p. 884):

> "'Due diligence' requires a carefulness of inspection and repair proportionate to the danger. *The Edwin I. Morrison*, 153 U. S. 199, * * *. From the facts respecting this leak and the circumstances, it is impossible for me to believe that such a careful, diligent examination as the construction of this vessel made necessary, would not have disclosed the defects in the seams about the centerboard; or that the inspection, by which the vessel is now sought to be justified, was other than casual, and superficial."

In the present case the owners are clearly chargeable with notice of the danger of a failure of the hull plating particularly in the vicinity of the G-2 plate. In the *first* place the vessel was 20 years old; in the *second* place she was operating in a trade where heavy sweating of the holds, which creates corrosion along the lines of the longitudinals in a longitudinally framed ship (513, 622-4, 640, 652, 1606-10), was to be expected (318, 320-3, 343-4, 371-4, 1020, 2636, 3107-9, 3122); in the *third* place it was a matter of common knowledge that plates in the vicinity of the G-2 plate are subjected to more strain through "panting" than other hull plates; and *fourthly* when the "Zarembo" was on drydock in January 1939, just one year before this accident, the attention of her owners had been called to the fact that the F-1 plates on both port and starboard sides showed signs of considerable wastage and should be renewed.

In the case of *The Tela,* 1936 A. M. C. 838, 840, Mr. James S. Hemingway, as arbitrator, used the following very pertinent language in his award:

> "While it may be unnecessary to test every plate in a ship at the time of a classification survey, it seems clear that this particular plate should have been tested because the plates immediately above and below it were evidently found to be in poor condition and were renewed, as were other plates in this hold. It must also be borne in mind that this ship was almost twenty years old and her plates should have been more carefully examined than the plates of a new ship."

In *Nord Deutscher Lloyd* v. *Insurance Company of North America,* 110 Fed. 420, a Harter Act case, the Circuit Court of Appeals for the Fourth Circuit said at page 427:

> " 'Diligence' and 'negligence' are relative terms, and depend on varying circumstances. Due diligence requires such watchful caution and foresight as the circumstances of the particular service demand. *It must be adequate to the occasion. It must be due*

diligence in the work itself, and not merely in the selection of agents to do the work; otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved whether such agents exercised due care or not to make their vessel seaworthy, and any responsibility would be frittered away. * * * No construction should be given to the act which would relieve them of the duty of that vigilant anxiety and solicitude which is required to make their vessels seaworthy." (Italics ours.)

Conclusion

Because the Circuit Court of Appeals for the Second Circuit has decided an important question of admiralty law contrary to the decisions of this Court and of the other Circuit Courts of Appeals, and because this question involves the construction of a new federal statute based upon an international convention designed to bring about uniformity in the maritime law as applied by the various maritime nations of the world, and because this statute has not yet been before this Court for consideration, we submit that a writ of certiorari should be granted in this case.

Respectfully submitted,

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Proctors for Petitioners.

[Appendix Follows]